The Court below in reviewing the trial court's action (or lack of it) as above held that the denial of Respondents' Rule 60 (b) motion constituted an abuse of legal discretion because the trial court not only failed to answer the basic question raised by the motion as to whether the judgment "was obtained in part by the use of perjury" but also because if had before it "unimpeached" testimony which "clearly" supported Respondents' motion. *Peacock Records, Inc.* v. *Checker Records, Inc.*, 365, F. 2d 145, 147, 148. Accordingly. the Court below in Appeal No. 15382 directed the trial court to vacate the judgment and grant Respondents a new trial. As to Appeal No. 14944, it simply directed that the judgment be vacated and remanded. (p. 148).

ARGUMENT

THERE IS NO CONFLICT OF DECISION

The Petition herein is founded upon an asserted conflict between the Ninth Circuit decision in *Atchison, Topeka & Santa Fe Railway Company* v. *Barrett*, 246 F. 2d 846 (1957) and the decision of the Seventh Circuit in the instant case. Petitioners' argument in this respect is far from clear. To the extent that it is discernible at all, it appears that it is directed to supposed differences between the two Circuits as to how an exercise of discretion is to be tested on review of the denial of a motion under Rule 60 (b) of the Federal Rules of Civil Procedure to set aside a judgment fraudulently obtained through perjured testimony suborned by a party to the action. Thus, Petitioners seem to contend that the failure of a trial court to "listen" to evidence offered in support of such a motion is considered an abuse of discretion in the Seventh Circuit whereas it is not such an abuse in the Ninth Circuit (Ptn. 16). This argument is entirely without merit and is based on an erroneous legal and factual conception of *Barrett*, as is hereinafter shown.

In both *Atchison, Topeka & Santa Fe Railway Company* v. *Barrett*, 246 F. 2d 846, 849 (1957) and the decision below, *Peacock Records, Inc.* v. *Checker Records, Inc.*, 365 F. 2d 145, 147 (1966), the two Courts of Appeals were concerned only with the District Courts' treatment on the record before the latter of the fact question as to whether the judgments attacked by the Rule 60 (b) motions were obtained in part by the use of perjury. If such perjury was established by clear and convincing evidence, both Courts of Appeal agreed that a judgment so tainted nec-

essarily would have to be vacated without weighing the effect of the perjury and that a failure under such circumstances to set aside the judgment would amount to an abuse of discretion. *Barrett*, p. 849; *Peacock*, p. 147, 148.

In the former case, the Ninth Circuit found that such perjury had not been so established on the record before the trial court because the proof there offered *and received* in support thereof was in the opinion of the Court of Appeals "far from conclusive" (*Barrett*, p. 848).*

However, in *Peacock*, the trial court never reached the question as to whether Woodard, Clinkscales and the Abrams had perjured themselves at the trial on the merits since it refused to take their testimony other than to elicit

---

* That proof consisted of movies taken of plaintiff by defendant after plaintiff had obtained a judgment for head injuries manifested at the trial by the jerking and twisting of his head. p. 847. The movies indicated the disappearance of such twitching but covered only fourteen minutes during four and one-half hours of personal observation over several days. p. 848. Obviously, such proof could not conclusively establish perjury with respect to such manifestations particularly since the Court of Appeals observed that "litigation neurosis" is accepted as a medical fact and that a "psychosomatic injury may be as real as one induced by trauma." p. 849. In passing, it is pointed out that the opinion while speaking of perjury does not identify it. There is thus some question as to whether perjury in the usual sense and as distinct from fraud and misrepresentation was involved at all in *Barrett*.

from them their desire to testify as per their affidavits*. Further, in the opinion of the Court of Appeals, on the record before the trial court, perjury was "clearly" established. *Peacock,* p. 148. It is these circumstances which distinguish the two cases, and makes them consistent with each other although different results were reached. Inconsistency in this respect could exist only if it were shown that in *Barrett* the trial court refused to view the physical evidence offered in support of the Rule 60 (b) motion and that such evidence was clear and conclusive as to perjury. Actually, the opinion there clearly indicates that not only did the trial court see and weigh such evidence but the Court of Appeals also did so. *Barrett,* p. 848. Thus *Barrett* cannot stand for the proposition urged by Petitioner (Ptn. 15, 16) that a refusal to consider evidence offered in support of a Rule 60 (b) motion does not constitute an abuse of discretion where the trial court has felt the 'climate' of the trial. It does stand for the proposition that a denial of such a motion does not amount to such an abuse where a) the trial judge considers all of the evidence in support of the motion and b) such evidence is not clear and convincing as to fraud on the court. That proposition is not at variance in any way with the decision below where, as

---

*It is clear from the record that these witnesses would so have testified, if permitted. (A., Appeal No. 15382 at 172, 175, 189, 191). Unlike the proof in *Barrett* based on the limited observations of others, this proffered evidence coming directly from the witnesses themselves was clear and conclusive as to the fraud perpetrated on the trial court. In fact, Petitioners in their answer to Respondents' Rule 60 (b) motion filed no counter-affidavits nor did they make any direct denials of the allegations contained in the witnesses' affidavits. No wonder the Court of Appeals found Respondents' evidence "unimpeached" p. 148. See *Klapprott* v. *United States,* 335 U.S. 601, 603, 604 (1949).

shown above, neither of these two elements were present. The reliance of the Court below on *Barrett* itself as well as *Parker* v. *Checker Taxi Company*, 7 Cir. 238 F. 2d 241 (1956) is significant in this connection.

Petitioners' argument based on *Cuthill* v. *Ortman-Miller Machine Company*, 7 Cir., 249 F. 2d 43 (1957) in no way is material to the only question presented here as to whether the Seventh and Ninth Circuits conflict and such argument should be disregarded. But worse, the decision is cited as if it barred any hearing at all on Respondents' motion because they already had "many days in court" at the trial on the merits. (Ptn. 18). This is sheer nonsense and is urged in support of Petitioners' incorrect assertion that the question of Woodard's, Clinkscales' and the Abrams' perjury at the trial was determined at the trial. Significantly, Petitioners do not point to the record below in order to support this statement nor could they in view of its patent ridiculous nature. In any event, it must be quite clear that the issue of whether a judgment was fraudulently obtained could not arise until the termination of the trial. Finally, it is pointed out that *Cuthill* instead of being against Respondents actually supports their argument. The quotation from it in the Petition (p. 18) is taken out of the context and refers to the very kind of hearing that Respondents sought here and were denied, i.e., upon a motion to vacate an alleged fraudulently obtained judgment. It has no application whatsoever as used in *Cuthill* to a prior trial on the merits as Petitioners would have this Court believe.

CONCLUSION

For the foregoing reasons and because of the lack of finality of this cause and lack of importance it is respectfully submitted that this Petition for a writ of certiorari be denied.

Respectfully submitted,

ANTHONY BRADLEY EBEN,
Counsel for Respondents.